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No. 95-647

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Petitioners,

v.

JEFF SESSIONS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JEFF SESSIONS
Attorney General of Alabama
WILLIAM H. PRYOR, JR.
Deputy Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

SUSAN RUSS WALKER
MILLER, HAMILTON, SNIDER & ODOM
One Colonial Financial Center, Suite 802
Montgomery, Alabama 36101
(334) 834-5550

DAVID R. BOYD
BALCH & BINGHAM
Post Office Box 78
Montgomery, Alabama 36101-0078
(334) 834-6500
(Counsel of Record)

FOURNIER J. GALE, III
MAYNARD, COOPER & GALE
1901 Sixth Avenue, North, Suite 2400
Birmingham, Alabama 35203-2602
(205) 254-1000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

QUESTIONS PRESENTED

1. Whether the all-but-unanimous *en banc* Court of Appeals erred in (i) approving the district court's mainstream approach to vote dilution analysis, which consisted of a searching and practical evaluation of all relevant evidence to determine whether black voters have diminished opportunity in judicial elections, and (ii) affirming the district court's ultimate finding, under the totality of the circumstances, of the absence of vote dilution.

2. Whether, as every Circuit Court of Appeals considering the question has concluded, a state's multidimensional interest in conducting trial judge elections not from subdistricts, but from districts which coincide with the judge's territorial jurisdiction, can defeat a vote dilution claim which seeks instead the election of judges from race-based subdistricts.

PARTIES TO THE PROCEEDINGS

Petitioners' statement is correct except that certain officials listed there have been succeeded in office by the following:

Perry O. Hooper, Alabama Chief Justice;

Jim Bennett, Alabama Secretary of State;

John Crowder, Probate Judge, Chambers County, Alabama;

Leland Avery, Probate Judge, Hale County, Alabama;

Lamar Turner, Probate Judge, Henry County, Alabama;

Luke Cooley, Probate Judge, Houston County, Alabama; and

Albert Howard, Probate Judge, Russell County, Alabama.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. STATEMENT OF THE FACTS 1

A. Introduction 1

B. Facts Relating to the Vote Dilution Inquiry 1

C. Facts Relating to the State Interest Issues 5

II. THE DECISIONS BELOW 7

A. Introduction 7

B. Resolution of the Vote Dilution Claim 8

C. The Alternative State Interest Holding ... 10

REASONS FOR DENYING THE WRIT 14

I. REVIEW IS NOT WARRANTED BECAUSE THE ELEVENTH CIRCUIT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY CHARACTERIZING THE QUESTIONS BELOW IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN *THORNBURG V. GINGLES* 14

II. REVIEW IS NOT WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE PROPER TREATMENT OF STATE INTERESTS IN VOTING RIGHTS CASES 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995) 18, 19, 20, 21, 22

Houston Lawyer's Ass'n v. Attorney General of Texas, 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991) 8, 13, 20, 21

Johnson v. DeGrandy, 512 U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) 17

League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 114 S.Ct. 878 (1994) 18, 19, 21, 22

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995) ..... *passim*

Shaw v. Reno, 509 U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) 12

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) 7, 8, 15, 17, 20

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. Introduction

Respondents (hereinafter "the State") incorporate by reference the summary statement of the facts set out in the *en banc* decision of the Eleventh Circuit. *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1284-88 (11th Cir. 1995) (en banc). The State reviews and supplements the Court of Appeals' statement below, while also correcting and adding to Petitioners' statement. Occasional reference is also made to the district court opinion. *Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992).

B. Facts Relating to the Vote Dilution Inquiry

The Court of Appeals describes Alabama's unified judicial system with its two tiers of trial courts; 56 F.3d at 1284; sets out relevant demographic information regarding the 10 judicial circuits and four districts which were challenged; *id.* at 1284-85; observes that Alabama's trial judges are elected at-large from their circuit or district using a numbered-place system where a circuit or district has more than one judge; *id.* at 1285; and explains that mid-term vacancies are filled by gubernatorial appointment, limited in four large, multi-judge circuits by nominating commissions which certify potential appointees for the Governor's consideration. *Id.*

The *en banc* decision also relates the history of the at-large election system, which has been in place pursuant

to the State's constitution, for non-racial reasons, continuously since 1850. 56 F.3d at 1285. The Court also explains that the numbered-place feature was instituted almost 70 years ago, also for reasons having nothing to do with race. *Id.* at 1285-86. There was no evidence that the challenged election system, or any of its component parts, was established or is being maintained for racially discriminatory purposes. *Id.* at 1292.

Judges must be licensed to practice law in Alabama. The Court of Appeals recalled statistics showing that black lawyers comprise a very small proportion of Alabama's lawyers, statewide (about 295 out of 9600) and in the circuits and districts in question. 56 F.3d at 1286-87, 1296. Some of the challenged circuits and districts have almost no black lawyers, and there is no reason to assume that the few black lawyers who do practice there are necessarily interested in a judgeship. 785 F. Supp. at 1476, 1481; R7-253; R12-1181/82; Plaintiffs' trial exhibits 167 pp. 31-32, 169 pp. 34-36. In the urban jurisdictions where there are more black attorneys, one finds black judges on the bench in greater proportion than black lawyers in the local bar.[1]

The Court correctly noted the absence (for many years) of any racial restrictions on Alabama law school

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[1] In the 10th Circuit (Jefferson County), three of 35 trial judges (8.6%) are black, but only 3.48% of the lawyers are black. In Mobile County, the 13th Circuit, only 2.1% of the lawyers are black, but two of the 14 trial judges (14.3%) are black. Similarly, in Montgomery County, the 15th Circuit, one of 10 trial judges is black (10%), but only 5.29% of the lawyers are black. 785 F. Supp. at 1476; State's trial exhibit 87.

admissions, as well as the State Bar's aggressive efforts toward inclusiveness. 56 F.3d at 1287. Still, about one-third of all the black attorneys who have ever been licensed in Alabama gained their licenses in the last five years. Most judges practice law for several years before seeking or being considered for the bench, which is another factor in circumscribing the potential pool of black candidates. *Id.* at 1296; 785 F. Supp. at 1476.

Judicial appointments are a major component of the process for choosing judges. A large majority of trial judges in the challenged circuits and districts came to the bench by appointment rather than election. 56 F.3d at 1293 n.22; State's trial exhibits 83, 90-91, 116; 785 F. Supp. at 1475. Incumbency is often the determining factor in judicial elections, and therefore trial judge elections very often go uncontested. 56 F.3d at 1293 n.22; R13-1398/1402; 785 F. Supp. at 1475. The importance of initial appointments and incumbency serves, along with other distinguishing characteristics, to illuminate the differences between judicial elections and elections for legislative bodies. 56 F.3d at 1293.

The current black trial judges followed the typical route: almost all were first appointed rather than elected and, once in office, were reelected, usually without opposition.[2] 56 F.3d at 1288. The Alabama Supreme Court has had two black members, both of whom came to the court

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[2] Petitioners err in stating that "none of the black judges in majority white jurisdictions" came to the bench originally by election. *Petition* at 6. Judge Cook of Jefferson County was elected to the bench in 1976 against white opposition. 56 F.3d at 1287; 785 F. Supp. at 1482; R12-1330.

by appointment and one of whom, Justice Oscar Adams, twice thereafter defeated well-known white opponents in statewide contests. Justice Ralph Cook, who himself had defeated a white opponent for a circuit judgeship, succeeded Justice Adams in 1993. *Id.*

Few non-incumbent black candidates have run for judgeships in majority white jurisdictions. One was victorious and four others lost for reasons other than their race – lack of support from the black community, partisan voting, or a poor bar rating. 56 F.3d at 1287-88; 1293-94.

The evidence included analyses by the State's political science expert of all contested judicial elections (beginning in 1976) in the challenged circuits and districts, including the few contests involving black candidates. 56 F.3d at 1290-91. Petitioners' expert analyzed only black versus white contests and, thus, focused almost entirely on non-judicial elections. *Id.* at 1290. The candidate preferred by black voters won in 76% of circuit court elections and in 77% of district court elections, and the black-preferred candidate prevailed at the circuit level in 83% of all statewide judicial elections. *Id.* at 1291. In addition, the candidate supported by a majority of black voters won at least 50% of the time in each of the challenged circuits and much more frequently in many circuits. State's trial exhibit 36, tables 6, 8; *see* R13-1380/81, 1410. The Alabama Democratic Conference, a powerful statewide black political caucus, regularly endorses and supports black and white judicial candidates. 56 F.3d at 1287 and n.9. Most of the judicial candidates that ADC endorses are elected. R9-444.

C. Facts Relating to the State Interest Issues

Both the district court and the *en banc* Eleventh Circuit recognized the strong interest which Alabama has in linking a trial judge's territorial jurisdiction and electoral base. 56 F.3d at 1296-97; 785 F. Supp. at 1478-79.[3] Linkage, as in the Alabama model, protects the balance between the desire for judicial accountability and the need to maintain judicial independence. 56 F.3d at 1297. Linkage accommodates accountability by assuring that every voter within the judge's jurisdiction will have an opportunity to vote to fill the judgeship, which a subdistricting system would not permit. *Id.* at 1296-97.[4] Linkage at the same time serves to protect independence by keeping the electorate broad enough – not only through numbers but through diversity as well – to provide the

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[3] The State argued that the linkage interest should be recognized as a matter of law, but also presented substantial evidence, through the testimony of judges, lawyers, and a political scientist, of the importance of maintaining a judge's electoral base coextensive with the judge's jurisdictional base. *See* 785 F. Supp. at 1478-79; R10-841/45; R11-878/920, 983/85, 1032; R13-1367/73.

[4] As the Court of Appeals observed, subdistricting could especially disadvantage minorities. They would not be allowed to participate in the election of most judges, who would not be accountable to them but who would nevertheless make most of the judicial decisions that will affect them. These decisions would be made, moreover, by a "lone decisionmaker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction." 56 F.3d at 1297; *see Nipper v. Smith*, 39 F.3d 1494, 1543-44 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995).

elected judge a buffer against possible political repercussions of volatile and controversial cases. *Id.* at 1297; R11-903/06. Subdistricting, on the other hand, would "increase the specter of 'home cooking' "; creating a smaller electorate would increase the pressure to favor electoral constituents. 56 F.3d at 1297.

Petitioners did not establish, as they would have this Court believe, that judges would be immune from influence by narrow constituencies because they "already adjudicate disputes between residents of their circuits and persons who live elsewhere in the state." *Petition* at 10. There was, in fact, conflicting testimony over whether judges could be credited with total indifference to the popular will when they nevertheless must stand for election. *See, e.g.*, R11-903/04. District Judge Truman Hobbs understandably took the Hobbesian view. 785 F. Supp. at 1479.[5]

Petitioners misstate Circuit Judge Smith's testimony. *Petition* at 11. Although he agreed with Petitioners' counsel that, e.g., judicial canons of ethics and disciplinary procedures could ameliorate the possibility of unfairness to out-of-district residents somewhat, R11-943, this hardly stilled his fears or caused him to be sanguine about the prospect of subdistricting. As to multi-member

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[5] Further, disputes between in- and out-of-county residents do not pressure judges for favoritism as would in- and out-of-single member district conflicts. The former are relatively rare, R11-902, while the latter would be constant, and a disgruntled litigant or offended constituency could hurt a judge's reelection chances much less circuitwide than in a single-member district that is one-24th or even one-half the circuit's size.

subdistricts, Judge Smith said nothing to suggest that use of these would "dramatically reduce" problems caused by single-member districts; his view essentially was that a multi-member districting remedy, though perhaps not as bad, was still awful. *See* R11-919/20; 941; *cf.* R11-991 (multi-member district is like doctor saying you will have one leg cut off instead of two).[6]

II. THE DECISIONS BELOW

A. Introduction

The district court decided the case, and the *en banc* Court of Appeals affirmed it, on two alternative bases. 56 F.3d at 1284. First, the trial court concluded, and the Eleventh Circuit agreed, that Petitioners proved no actionable vote dilution under the principles of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *See* 56 F.3d at 1289-94. In the alternative, the courts below agreed that, because of Alabama's linkage interest

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[6] Contrary to their assertions, *Petition* at 10-11, Petitioners also did not establish that the judicial system in Mississippi has not been harmed by court-ordered subdistricting. Plaintiffs offered only the testimony of one black judge, who owed his election to subdistricting, who "[could not] say that [he had] seen anything negative," Plaintiffs' trial exhibit 172, p.22, and the observation of one white lawyer, who did not indicate that he consulted judges, litigants or the rest of the bar, that in his personal view "the system operates the same as it did before there was subdistricting." Plaintiffs' trial exhibit 173, p.22. The trial court obviously put little stock in this testimony, an appropriate reaction given the very short time in which the new system has operated. R11-936, 949.

in particular, the subdistricting remedy sought by Petitioners was not a feasible alternative to the challenged system. Relying on this Court's decision in *Houston Lawyer's Ass'n v. Attorney General of Texas*, 501 U.S. 419, 426-27, 111 S.Ct. 2376, 2381, 115 L.Ed.2d 379 (1991), the courts below therefore concluded that even if Petitioners' opportunity to participate in the challenged elections was being abridged, no remedy is available in this case. 56 F.3d at 1294; *see Nipper v. Smith*, 39 F.3d 1494, 1529 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995). The same conclusion would be inevitable, the Court of Appeals held, if a slightly different analytical model were employed. That is, if the court weighed the State's interest against "whatever possible vote dilution may have been shown", the State would prevail. 56 F.3d at 1297.

B. Resolution of the Vote Dilution Claim

Applying the "clearly erroneous standard", the Court of Appeals found no cause to disturb the district court's ultimate finding that "racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " 56 F.3d at 1292-94. The *en banc* Court considered the district court to have "engaged in a searching and meaningful evaluation of *all* the relevant evidence", consonant with this Court's teachings in *Gingles*, and found the evidentiary record "ample" to support the district court's decision. *Id.* at 1293 (emphasis in original).

The Eleventh Circuit reviewed the lower court's "totality of the circumstances" analysis and found it not

only to be in keeping with settled law, *see* 56 F.3d at 1292, but particularly appropriate for a case involving judicial elections, which, as the Court observed, are characterized by "significant differences" from legislative elections, which are more often the focus of Section 2 litigation. *See id.* at 1293. The Court of Appeals approved of the district court's decision to consider *all* the election information supplied by the competing experts – including statistics drawn from non-judicial elections in which black candidates competed as well as from all judicial elections in the challenged jurisdictions, regardless of the candidates' race – but to be mindful of the differences between these types of elections by giving greater weight to the evidence drawn from judicial elections. *Id.* The district court was applauded for its refusal to accept the experts' respective invitations to ignore any but their evidence, and for its insistence on considering "any evidence that explained election results." *Id.* The reviewing court understood that the trial court also considered the other "contextual materials" relevant to a Section 2 vote dilution inquiry. *Id.* Summarizing, the Court of Appeals wrote as follows:

> [T]he district court undertook the requisite practical, searching inquiry required in Section 2 cases. *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2764. The court appropriately considered all the circumstantial evidence – both statistical and anecdotal – that was offered.

Id. at 1292; *see Nipper*, 39 F.3d at 1527 (explaining the need to consider a wide variety of circumstances when evaluating vote dilution claims and observing that "the types

of evidence that would be relevant . . . plainly defy categorization.").[7]

C. The Alternative State Interest Holding

In the courts below, Petitioners sought a remedy which would divide the challenged circuits and districts into single or multi-member election districts to ensure the election of blacks to judgeships. 56 F.3d at 1289.[8] Such

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[7] Petitioners criticize the district court for attaching significance to the small number of black lawyers in the challenged jurisdictions and for comparing the percentage of black lawyers to the percentage of black judges. *Petition* at 13. Not only is this evidence relevant to a factor explicitly made part of vote dilution analysis by the very language of Section 2 – the degree of *success* of black candidates – it is exactly the kind of circumstantial evidence that is essential for consideration in the "totality of the circumstances" analysis. *See Nipper v. Smith*, cited in accompanying text. While recognizing that the fact blacks have been elected to judgeships in numbers disproportionate to their numbers in the bar was only one factor to be considered, 785 F. Supp. at 1477, the district court charitably characterized as "amazing" Petitioners' argument that this evidence was utterly irrelevant. *Id.* at 1476.

[8] Petitioners disclaim having proposed as a remedy a modified at-large election system, such as cumulative voting, which would, among other changes to the existing election system, do away with the numbered-place feature and require that judges run against one another. *See* 56 F.3d at 1296 n.24; *Petition* at 12. Observing that "a worse system could not be imagined", the district court had correctly held that the State has a strong interest in avoiding the problems that would inevitably be associated with such a system. 785 F. Supp at 1490, 1477. The Eleventh Circuit heartily agreed, characterizing as "invidious" the effects – on the collegiality of the court as well as on lawyer

subdistricting would eliminate the linkage between the judges' territorial jurisdictions and their electorates, and would in the process disfranchise the voters in the judge's jurisdiction who reside outside the election subdistrict. *Id.* The State contended, and both courts below agreed, that the subdistricting remedy was "unfeasible, given the State's legitimate interest in maintaining the linkage between a trial court's jurisdiction and elective base and guaranteeing a pool of potential candidates large enough to give the voters a reasonable choice . . . " *Id.* at 1289.[9]

Expounding on the district court's decision, the Eleventh Circuit examined the importance of linkage and the serious problems associated with subdistricting. Linkage

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interest in a judicial career – which eliminating the numbered-place feature would have. 56 F.3d at 1296 n.24.

[9] Another remedy which was sought by Petitioners was a reconfiguration of several multi-county circuits in order to create majority-black circuits. *See* 56 F.3d at 1294-96. This proposal was rejected by the district court and the Court of Appeals for the same reasons, including the fact that the existing circuits are maintained for reasons relating to caseload, population density, and other factors which affect the allocation of judicial resources, and that the only reason for the proposed change would be to elect black judges, making race "the linchpin of the judicial system." *Id.* at 1295; *see* 785 F. Supp. at 1477. The courts below emphasized, moreover, that many of the counties proposed for realignment into black circuits have few if any black lawyers, a circumstance of serious concern given "[t]he State's interest in having a pool of black lawyers large enough to give the voters a reasonable choice." 56 F.3d at 1296. Petitioners mention their unsuccessful challenge to the circuit configuration, but declare its details "not relevant to the questions presented" by their Petition. *Petition* at 2 n.2.

holds trial judges accountable to all the voters in their territorial jurisdiction, while subdistricting disfranchises all but those who reside in the subdistrict. At the same time, linkage offers the judges a buffer from the whims of a small electorate or special interests and thus avoids *too much* "responsiveness"; subdistricting, however, brings the judge too close to the electorate, increasing the pressure to favor constituents and the "specter of home cooking." 56 F.3d at 1296-97; *see Nipper*, 39 F.3d at 1544.

Pointing out that the "responsiveness" concern associated with subdistricting has a racial component as well, the Court of Appeals wrote as follows:

> It has been written that remedial plans in the legislative context may "reinforce[] racial stereotypes and threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, ___ U.S. ___, ___, 113 S.Ct. 2816, 2828, 125 L.Ed.2d 511 (1993). This proposition seems quite accurate in the context of state trial court judges who must not engage in traditional legislative "responsiveness."

56 F.3d at 1297; *see Nipper*, 39 F.3d at 1543-44. Rejecting Petitioners' argument that codes of judicial ethics and appellate review provide adequate safeguards against favoritism concerns, the circuit court went on as follows:

> [O]nce court-ordered subdistricting sends the message, as it inevitably would, that race matters in the administration of justice, no procedure could mitigate the devastating effects. If favoritism concerns were rooted in racial issues, the fundamental fairness of the judicial system

> would continually be questioned. Such a redistricting remedy would reintroduce, to a greater degree, the very vices from which the appellants seek relief.

56 F.3d at 1297.

Applying principles it had discussed in greater detail a few months earlier in its *en banc Nipper v. Smith* decision, the Eleventh Circuit therefore concluded that, even "assuming that [Petitioners'] opportunity to participate in the challenged elections was being abridged", the State's interest in its existing judicial election system precluded the subdistricting remedy proposed by Petitioners and a finding of a Section 2 violation.[10] 56 F.3d at 1294, citing *Houston Lawyers' Ass'n*, 501 U.S. at 426-27.[11]

Recognizing that *Houston Lawyers' Ass'n* leaves some room for courts to craft the precise analytical model for

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[10] In *Nipper*, the Court of Appeals explained that availability of a workable remedy within the confines of the state's system of government is a threshold requirement of Section 2 and critical to the success of a vote dilution claim, and concluded that subdistricting for Florida trial judge elections was not a workable remedy, thus precluding Section 2 liability. 39 F.3d at 1530-33, 1542-47.

[11] Although its principal focus was on the State's linkage interest, the Court of Appeals joined the district court in recognizing the additional and closely related state interest in avoiding election subdistricts which, especially in jurisdictions which already have only a handful of lawyers, would not offer a pool of black lawyers of sufficient size to give voters "a reasonable choice from which to select a qualified candidate." 56 F.3d at 1296; *see* 785 F. Supp. at 1479-80. This interest in an adequate pool was considered important by the Eleventh Circuit also on Petitioners' circuit reconfiguration claim, which is not raised in their Petition. *See* note 9 *supra*.

considering the importance of the State's interest in the Section 2 calculus, the Eleventh Circuit emphasized that its remedy-oriented model was not the only approach which would lead to the correct result. If Alabama's important interests were balanced against proven vote dilution, the Court held in the alternative, "these interests outweigh whatever possible vote dilution may have been shown in this case." 56 F.3d at 1297.

REASONS FOR DENYING THE WRIT

I. REVIEW IS NOT WARRANTED BECAUSE THE ELEVENTH CIRCUIT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY CHARACTERIZING THE QUESTIONS BELOW IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN *THORNBURG V. GINGLES*.

Petitioners maintain that this case is worthy of Supreme Court review because, they say, the *en banc* Eleventh Circuit improperly considered the legal issues Petitioners presented on appeal to be subsumed within a challenge to the district court's finding on the ultimate factual issue of whether vote dilution was present. Petitioners argue that this alleged error was of such magnitude that an exercise of this Court's supervisory power is called for to correct it. This argument is without merit for two reasons. First, the Eleventh Circuit properly (if implicitly) rejected Petitioners' claims of legal error because the contrary result would have excluded relevant facts from the Court of Appeal's consideration of the totality of the circumstances. Second, even if Petitioners

are correct that the *en banc* Court erred in some respect, Petitioners have failed to show how the outcome of the case was affected.

The fact that Petitioners thought they were raising some issues on appeal that were legal, not factual, was not lost on the Eleventh Circuit. The Court wrote: "Appellants contend that the district court's finding that the challenged electoral systems do not afford them less opportunity than other members of the electorate to participate in the political process and to elect candidates of their choice is clearly erroneous. According to appellants, the district court should have found to the contrary *as a matter of law.*" *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995) (*en banc*) (emphasis added) (hereinafter *"SCLC"*). Nor did the responsibility to correct errors of law that might affect its factual inquiry escape the Court of Appeals. Indeed, in its opinion in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995), which was argued along with the instant case, the Eleventh Circuit specifically recalled the admonition of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that although "[t]he determination of vote dilution . . . is subject to review under the clearly erroneous standard of Rule 52(a)," that rule " 'does not inhibit an appellate court's power to correct errors of law . . . .' " *Nipper*, 39 F.3d at 1537 n. 82 (quoting *Gingles*, 478 U.S. at 79).

In this case, the circuit court simply did not encounter any errors of law committed by the district court that it thought required correction. The legal errors claimed by Petitioners – that the district court "applied the wrong standard by focusing on black voters' opportunity 'to

influence' elections rather than on their opportunity 'to elect' candidates of their choice"; "focused on the wrong elections when it relied on the results of white vs. white contests given that blacks had been deterred from running"; improperly "treated the case like an employment discrimination dispute and compared the percentage of black lawyers to the percentage of black judges"; and wrongly "credit[ed] state interests [in having an adequate pool of lawyers to draw from in electing judges] that the state itself did not contend it had," *see Petition* at 23-24 – go to the question of what evidence a court may consider in evaluating a Section 2 claim. In essence, Petitioners' "legal" claims asked the circuit court to rule that the district court could not take into account a number of *facts*: the fact that minority influence on all judicial elections would be diminished by subdistricting; the fact that black voters had been highly successful in electing their candidates of choice in white versus white contests; the fact that the proportion of African-Americans holding elected judicial office in Alabama substantially exceeds the proportion of black lawyers in the bar; and the fact that the State has a vital interest – whether this interest was directly asserted by Respondents or fairly inferred by the district court from the evidence – in having a pool of black lawyers of sufficient size to offer a reasonable choice to voters.

However, the Eleventh Circuit declined, as did the district court, to ignore *any* relevant evidence. Instead, according to the circuit court, the district court "appropriately considered all of the circumstantial evidence – both statistical and anecdotal – that was offered." *SCLC*, 56 F.3d at 1292; *see also id.* at 1293 ("the district court

engaged in a searching and meaningful evaluation of *all* the relevant evidence concerning the challenged trial court jurisdictions."); *id.* at 1291, 1297 (discussing subdistricting's effect on minority influence); *id.* at 1291, 1293 (evaluating significance of white vs. white elections); *id.* at 1286-87 (comparing the proportion of black lawyers with the proportion of black judges); *id.* at 1296 (noting the state's interest in an adequate pool of black lawyers). As the Eleventh Circuit recognized, this approach is dictated by this Court's holding in *Gingles*, and the more recent case of *Johnson v. DeGrandy*, 512 U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). *See Gingles*, 478 U.S. at 79 (consideration of the totality of the circumstances based upon a searching practical evaluation of the past and present reality is "peculiarly dependent upon the facts of each case."); *DeGrandy*, 129 L.Ed.2d at 791 ("the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."); *Nipper*, 39 F.3d at 1527 ("A court should not exclude certain types of relevant evidence – certain colors on the canvas – from its examination if doing so would leave an incomplete view of the circumstantial evidence picture."). The Court of Appeals did not err in this regard.

Finally, even if the Eleventh Circuit did substantially recast Petitioners' claims of error in any respect – a common hazard of appellate review, not a cataclysmic deviation from the accepted course of judicial proceedings – Petitioners fail to explain how the result of the case was affected. Their bare assertion that the court's alleged error "may have determined the outcome of the case,"

Petition at 24, without more, amounts to a concession by omission that Petitioners cannot explain exactly how this "outcome" might have been affected. No significant substantive point raised by Petitioners was left unaddressed by the circuit or district court. Repetition by this Court of the review of Petitioners' case already exercised by the district court, and by the Eleventh Circuit sitting *en banc*, would serve no useful purpose and would correct no departure from the accepted and usual course of judicial proceedings worthy of granting the writ of certiorari.

II. REVIEW IS NOT WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE PROPER TREATMENT OF STATE INTERESTS IN VOTING RIGHTS CASES.

Petitioners also argue that this Court should grant certiorari to resolve an alleged conflict between the Eleventh Circuit, on the one hand, *see SCLC v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (*en banc*); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995), and the Fifth and Sixth Circuits on the other, *see League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) ("*LULAC*"), *cert. denied*, 114 S.Ct. 878 (1994); *Cousin v. McWherter*, 46 F.3d 568 (6th Cir. 1995). According to Petitioners, the Eleventh Circuit takes the position that a state's interest in its judicial election system "has minimal relevance in the totality of the circumstances analysis," but plays a "major role" in the factual determination of whether there are feasible, alternative remedies to the challenged election system. *Nipper*, 39 F.3d at 1542. Petitioners say that this approach conflicts with the Fifth and Sixth Circuits' view that it is

necessary to balance the state's interest, whose weight is a question of law, against evidence of vote dilution in evaluating the totality of the circumstances. *See LULAC*, 999 F.2d at 868; *Cousin*, 46 F.3d at 577.

Petitioners' argument should be rejected for several reasons. First, the "conflict" alleged was not created by the instant case; instead, it arose, if at all, in the Eleventh Circuit's decision in *Nipper*, where the principle of law to which Petitioners refer was actually set out. *Nipper*, 39 F.3d at 1542.[12] This Court has already declined to grant certiorari in the *Nipper* case, which involved a similar Section 2 challenge to the election of Florida judges. *See Nipper v. Smith, cert. denied*, 115 S.Ct. 1795 (1995).

Second, if there is a conflict, as alleged, it is one that has no adverse consequences for Petitioners. On the contrary, Petitioners do not, and cannot, explain how the result in this case would be different if this Court instructed the Eleventh Circuit to follow the Fifth and Sixth Circuits in finding that the state's interest *is* relevant in the totality of the circumstances analysis, and must be balanced against any evidence of vote dilution (assuming that the Eleventh Circuit did not in fact

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[12] Interestingly, petitioners in the *Nipper* case did not perceive the conflict asserted here. Instead, they maintained that *Nipper* was in conflict with decisions of the Fifth and Sixth Circuits because *Nipper* held, according to petitioners in that case, that "the state's interest in retaining existing judicial election districts outweighs, as a matter of law, any and all evidence of vote dilution," *Petition* in *Nipper* at 24 – thus suggesting, ironically, that the *Nipper* petitioners thought that the Eleventh Circuit *did* weigh this interest in the totality against evidence of vote dilution.

already do this).[13] Here, the Eleventh Circuit concluded in Part III. A of its decision that there *was* no vote dilution, without even reaching the state interest question; as an alternative holding only the Court determined that, assuming vote dilution, no remedy was available because of the state's interests in the present electoral system. Therefore, no vote dilution existed in this case against which the Court could be admonished to weigh the state's interests (if it did not do so), and no different resolution of the case could result for Petitioners.

Finally, there is no material – much less irreconcilable – conflict between the Eleventh Circuit and the Fifth and Sixth Circuits in these cases in any event. In each of the decisions cited, the respective circuit courts properly recognized the district courts' obligation to conduct a "searching practical evaluation of the past and present reality," and to employ a "functional view of the political process." *Thornburg v. Gingles*, 478 U.S. at 45; *see also SCLC*, 56 F.3d at 1293; *Cousin*, 45 F.3d at 576; *Nipper*, 39 F.3d at 1527; *LULAC*, 999 F.2d at 860. In all these cases, the circuit courts duly followed this Court's admonition in *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), that the state's interest is "a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a Section 2 violation has occurred." *Id.* at 427; *see also SCLC*, 56 F.3d at 1294; *Cousin*, 46 F.3d at 574; *Nipper*, 39 F.3d at 1541;

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[13] If Petitioners do *not* want this Court to resolve the alleged conflict in favor of either the Eleventh Circuit's or the Fifth and Sixth Circuit's approach but, instead, advocate an entirely new analysis, then a *conflict* of the circuits under Rule 10(a) is not the correct justification for their petition.

LULAC, 999 F.2d at 869. And, in the three cases in which the circuit court reached the merits of the plaintiff's claims (the *Cousin* case did not, *Cousin*, 46 F.3d at 577), the result uniformly was that each state's system for electing its trial judges – systems in Alabama, Florida and Texas which were, in the main, quite similar – was sustained against Section 2 challenge. *See SCLC*, 56 F.3d at 1297; *Nipper*, 39 F.3d at 1547; *LULAC*, 999 F.2d at 837.

The Eleventh Circuit's observation in *Nipper* that Florida's so-called "linkage" interest had "minimal relevance in the totality of the circumstances analysis in [that] case," *Nipper*, 39 F.3d at 1542, does not indicate that this interest was not *considered* in the totality. On the contrary, the Eleventh Circuit explicitly acknowledged that "Florida's interest in maintaining the current electoral systems . . . should be taken into account in determining whether, under the totality of the circumstances, the appellees have violated section 2," following the command of *Houston Lawyers' Ass'n*. *Id.* at 1541 (citing *Houston Lawyers' Ass'n* , 501 U.S. at 426); *see also Nipper*, 39 F.3d at 1535 n. 77 ("The policy underpinning the linkage provided by the challenged schemes is a factor to be taken into account in deciding whether, under the totality of the circumstances analysis, the appellants have presented a case of vote dilution. We take this policy into account *infra* part IV. D.") (citation omitted); and *id.* at 1547 ("Among the factors a court must consider in conducting [the totality of the circumstances] analysis is the state policy advanced by the judicial scheme at issue."). The Eleventh Circuit simply concluded, in considering the state's interests in its totality inquiry, that the linkage interest specifically "neither establishes nor rebuts the

existence of racial bias in the community" and, thus, it had little impact on the totality analysis in that case. *Id.* at 1542. Without discussion, the Eleventh Circuit apparently followed *Nipper* in this regard in deciding *SCLC*. These decisions do not depart significantly from the *LULAC* case, in which the Fifth Circuit noted that "[a] substantial state interest . . . is not raised to *disprove* the existence of dilution," but rather is "weighed *against* proven dilution to assess whether such dilution creates § 2 liability." *LULAC*, 999 F.2d at 871 (first emphasis added; second emphasis in original); *see also Cousin*, 46 F.3d at 577 (implicitly following the *LULAC* analysis).

Nor do the *Nipper* and *SCLC* decisions substantially diverge from the *Cousin* and *LULAC* doctrine that state interests are to be weighed against proven vote dilution. *See Cousin*, 46 F.3d at 577; *LULAC*, 999 F.2d at 868. Indeed, in *Nipper*, four of the six judges in the plurality (Edmondson, Cox, Birch and Dubina, J.J.) explicitly noted their view that Florida's state interest is, "as a matter of law, great and outweighs (either at the vote-dilution-finding-stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here."[14] *Nipper*, 39 F.3d at 1547 (*citing, inter alia*, *LULAC*, 999 F.2d at 868). Even more important to the petition in the instant case, the majority of the *en banc* court in *SCLC* expressly

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[14] Although Petitioners claim in their Petition that the Eleventh Circuit does not consider the weight of a state interest to be a question of law, they offer no citation in support of this assertion, which is belied by the only explicit statement directly related to this point in these cases, quoted above.

held that if there *were* any vote dilution, the state's interests "outweigh whatever possible vote dilution may have been shown in this case." *SCLC*, 56 F.3d at 1297.

Under these circumstances, any alleged conflict in the circuit courts is illusory, and the writ of certiorari is accordingly due to be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

JEFF SESSIONS
Attorney General of Alabama
WILLIAM H. PRYOR, JR.
Deputy Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

DAVID R. BOYD
BALCH & BINGHAM
Post Office Box 78
Montgomery, Alabama 36101-0078
(334) 834-6500
(Counsel of Record)

SUSAN RUSS WALKER
MILLER, HAMILTON, SNIDER & ODOM
One Colonial Financial Center,
Suite 802
Montgomery, Alabama 36101
(334) 834-5550

FOURNIER J. GALE, III
MAYNARD, COOPER & GALE
1901 Sixth Avenue, North,
Suite 2400
Birmingham, Alabama 35203-2602
(205) 254-1000

Counsel for Respondents